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SUPREME COURT OF THE UNITED STATES

1994 TERM

CLARENCE YODER AND LEONA YODER

V.

ELKHART COUNTY AUDITOR and ELKHART COUNTY TREASURER

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

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QUESTIONS PRESENTED

Whether the Appellee-Defendant, Elkhart County Auditor (Auditor), violated due process by selling Appellants' home without giving them actual notice of a tax sale, or notice reasonably calculated to inform them of the tax sale.

What are the minimum constitutional requirements that the Auditor must use to locate a home owner, and send him notice, when certified notice of a tax sale to the homeowner comes back unclaimed, and the homeowner's new address is reasonably ascertainable.

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JURISDICTION AND OPINIONS BELOW

Appellants, Clarence Yoder and Leona Yoder (homeowners), appeal the decision of the Indiana Court of Appeals dated April 7, 1994. The decision by the Indiana Court of Appeals is reported at 632 N.E.2d 369. The homeowners filed a Petition To Transfer to the Indiana Supreme Court on April 25, 1994. The Petition To Transfer was denied on July 19, 1994.

This appeal is being docketed in this Court within ninety (90) days of the denial of transfer by the Indiana Supreme Court. The jurisdiction of this court is invoked under 28 USC §1257, 28 USC §2101(c); and 28 USC §2104.

UNITED STATES CONSTITUTION

This case involves the application of due process under the Fourteenth Amendment of the United States

Constitution which provides that:

> . . . . . .No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATE STATUTES

The Indiana statutes applicable to this case are found in the Indiana Tax Sale Statutes, I.C. §6-1.1-24-1 et seq. and I.C. §6-1.1-25-1 et seq. The most relevant statutes are as follows:

IND. CODE §6-1.1-24-4

> (a) In addition to the notice required by Section 3 of this chapter, the county auditor shall send a notice of the sale by certified mail to the owner or owners of the real property at their last address. The county auditor shall prepare

the notice in the form prescribed by the State Board of Accounts, and he shall mail the notice at least twenty-one (21) days before the date of sale. . . .

IND CODE §6-1.1-25-6

(a) The county auditor shall send a notice by certified mail to the former owner of real property not more than sixty (60) days nor less than thirty (30) days before a tax deed for the property is executed and delivered under this chapter. The county auditor shall prepare the notice on the form prescribed by the State Board of Accounts. . . .

IND. CODE §6-1.1-25-4(d)

(d) A tax deed executed under this section vests in the

> grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except for the lien of the state for taxes and special assignments which accrue subsequent to the sale and which are not removed under subsection (c) of this section. . . .

STATEMENT OF THE CASE

The Elkhart County Auditor (Auditor) sold Clarence and Leona Yoder's (homeowners) home at a tax sale without giving them actual notice. During the relevant time of the tax sale in 1985, the homeowners owned a number of parcels of real estate in Elkhart County. There was a mortgage covering all of the homeowners' property except their house at 2608 S. Main St., Goshen, Indiana. During this time, the homeowners suffered financial

problems and their business, Yoder Feed Supply, was forced to close. The bank also foreclosed on its mortgage. During the foreclosure proceedings, the bank was paying the homeowners' real estate taxes, so the homeowners did not pay them. But, since the mortgage did not cover the house located at 2608 S. Main St. in Goshen, Indiana, the bank did not pay the taxes on 2608 S. Main St., and they became delinquent.

Under Indiana law, the Auditor can sell tax delinquent property. Pursuant to then applicable Indiana law, the Auditor was required to give notice to a taxpayer that there was going to be a sale of the taxpayer's property because of tax delinquencies. This notice was to be sent by certified mail. I.C. 6-1.1-24-4.

On or about June 28, 1985, notice of the tax sale was sent by certified mail to the Yoders at the homeowners' place of

business, Yoder Feed Supply, 524 E. Lincoln Avenue, Goshen, Indiana, the last known address of the homeowners according to the records in the Auditor's Office. As noted, this business was closed at that time. This notice was returned to the Auditor as unclaimed. During this period of time, the homeowners' name and current mailing address was in the Goshen City phone book. The Auditor's office is in Goshen, Indiana.

On August 12, 1985, the Auditor sold the homeowners residence to Richard Adams [1] at a tax sale. Under then applicable Indiana law [2], a home owner had two years following the tax sale to redeem his property or a tax

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[1]This is the same Richard Adams who was the Appellee in Mennonite Board of Missions v. Richard Adams, 462 U.S. 791 (1983).

[2]The tax sale statutes in question, I.C. 6-1.1-24-1 et seq. have been amended. The amendments are not a consideration in this appeal.

deed would be issued to the tax sale purchaser.

On or about July 14, 1987, the Auditor in accordance with then applicable Indiana law

[3] sent a certified letter to the homeowners of their right to redeem their home which was sold at a tax sale. This notice was again sent to the homeowners at 524 E. Lincoln Avenue. This notice came back unclaimed. During this period of time, the homeowners were living at their home, 2608 S. Main St., the very property which was the subject of the tax sale. The homeowners' name, address, and phone number were reasonably ascertainable. It was in the Goshen City phone book. Furthermore, under Indiana law, the Treasurer and Auditor are required to share taxpayer information. The Elkhart County Treasurer had the homeowners'

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[3]See Footnote 2.

current address of 2608 S. Main St. The Treasurer had sent the homeowners a separate tax notice at 2608 S. Main St. before the redemption period had expired, but never sent notice to the homeowners of the tax sale itself..

On August 13, 1987, a tax deed was issued to Richard Adams. After the expiration of the redemption period, Adams went to the Yoders' home at 2608 S. Main St. and informed them he was the new owner. The homeowners then filed a three count complaint to quiet title on November 19, 1987, seeking in Count I to have the tax sale set aside, arguing that the tax sale was invalid because they did not receive actual notice of the sale from the Auditor and the Treasurer. Count II was a claim for adverse possession against Adams because the homeowners were in possession of the home before and after the tax sale. Count III was a complaint against the Auditor and

Treasurer for damages in connection with the unconstitutional sale of the Yoders' home.

The homeowners then settled their case with the tax sale purchaser, Adams, and then filed a motion for summary judgment against the Auditor and Treasurer for failing to provide the homeowners notice of the tax sale.

On January 21, 1991, the trial court denied the homeowners' motion for summary judgment against the Auditor and Treasurer, and granted the Auditor and Treasurer's motion for summary judgment against the homeowners. The trial court upheld the validity of the tax sale.

On April 7, 1994, the Court of Appeals rendered its decision upholding the summary judgment of the trial court. See Yoder v. Elkhart County Auditor and Elkhart County Treasurer, Ind. App., 632 N.E.2d 369 (1994). The Indiana Supreme Court, on July 19, 1994, denied transfer without an opinion.

CONSTITUTIONAL ISSUE OF DUE PROCESS FIRST RAISED

Before the trial court, the homeowners first argued the tax sale was invalid based upon this court's precedent in Mennonite and Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988). The Indiana Court of Appeals in this case found the tax sale was valid. It determined there was no constitutional requirement under Mennonite for the Auditor or Treasurer to look for a change of address for a home owner outside of the official tax rolls contained in the Auditor's office. The Court of Appeals relied upon an Indiana case, Elizondo v. Read, Ind., 553 N.E.2d 849 (1990), which had interpreted this Court's decision in Mennonite. The Indiana Supreme Court in Elizondo determined that due process under Mennonite did not require the Auditor to look in the phone book for the proper address for a home owner when a

certified notice came back unclaimed. All that was required, according to the Indiana Supreme Court's interpretation of this Court's decision in Mennonite, was for the Auditor to send notice at the last known address, based upon records maintained in the Auditor's office. The Indiana Supreme Court in Elizondo held that the taxpayer has the burden of notifying the government of a change of address, relieving the Auditor of any constitutional requirement to investigate a taxpayer's change of address outside of its own official records.

This case presents the question of what are the minimum constitutional requirements to locate a taxpayer, who has moved, to give him notice of a tax sale. In Mennonite, this Court held that "notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property

interests of any party, . . .if [his name], and address are reasonably ascertainable." Id. at 800. In this case, the homeowners' name and address were easily ascertainable. It was in the local phone book. Furthermore, the homeowners were living at the very property which was sold by the Auditor. Under these circumstances, the homeowners believe a logical extension of this Court's decision in Mennonite would have required that the Auditor utilize reasonable business practices to find the current address of a taxpayer, when a certified letter comes back unclaimed. At a minimum, the homeowners contend due process would require the Auditor to conduct a reasonable investigation, such as looking in a local phone book or going to the property in question to see who was in possession of it, in order to find and give notice to a homeowner. Utilizing either means in this case would have provided the

homeowners' name and address. Cf. Robinson v. Hanrahan, 409 U.S. 38 (1972) and Covey v. Town of Somers, 351 U.S. 141 (1956).

Furthermore, the question presented by this appeal is substantial and is likely to recur. On the one hand, every state has a statutory scheme to collect taxes, and to sell real property when taxes are delinquent. On the other hand, this case involves the fundamental right to own real property. The notice issue presented in this appeal has been addressed by numerous states. Those cases are in conflict with this case. The prevailing view from other states is in general that due process, as set out by this court in Mennonite, would require the government to conduct a reasonable investigation to ascertain the name and address of a missing taxpayer, and such reasonable investigation would include looking in a phone book or going to the property in question. Compare the decisions

from New York[4],

Mississippi[5],

West Virginia[6],

Idaho[7],

North Dakota[8],

Massachusetts[9],

Pennsylvania[10],

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[4]McGann v. Scaduto, 71 N.Y.2d 164, 524 N.Y.S.2d 398, 519 N.E.2d 309 (1987)

[5]DeWeese Nelson Realty v. Equity Services, Miss., 502 S.2d 310 (1987)

[6]Lilly v. Duke, W.Va., 376 S.E.2d 123 (1988)

[7]Giacobbi v. Hall, Ida., 707 P.2d 404 (1985)

[8]Miles Homes Division of Insilco Corp. v. City of Westhope, N.D., 458 N.W.2d 321 (1990)

[9]City of Boston v. James, 530 N.E.2d 1254, 1256 (1988)

[10]Geier v. Tax Claim bureau of Schuylkill County, et al., Pa. App., 570 A.2d 134 (1990); Tracy v. County of Chester, Tax Claim, Pa., 489 A.2d 1334, 1338 (1985); In Re Upset Sale, 505 Pa. 327, 479 A.2d 940 (1984)

New Jersey[11],

New Mexico[12],

Oregon[13],

Michigan[14],

and Oklahoma[15],

which have held that the government must conduct a reasonable investigation to find a new taxpayer address, to this case from Indiana, which held the

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[11]Sourlis v. Borough of Red Bank, N.J. App., 532 A.2d 740, 742 (1987)

[12]Klineline v. H.R. Blackhurst, et. al., 106 N.M. 732, 749 P.2d 1111 (1988); Hoffman v. State, 117 N.M. 263, 871 P.2d 27 (1994)

[13]Davenport v. Gruber, 111 Or. App. 280, 826 P.2d 59 (1992); Seattle First National Bank v. Umatilla County, 77 Or. App. 283, 713 P.2d 33 (1986)

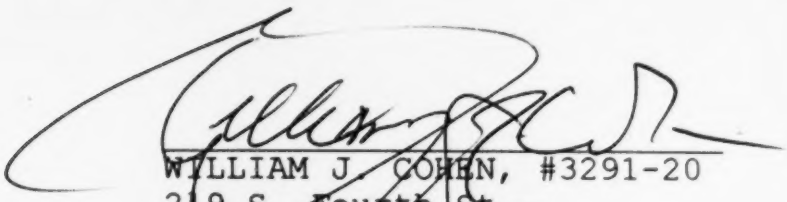
[14]City of Detroit v. Blake, 144 Mich. App. 432, 376 N.W.2d 114 (1984)

[15]Wells Fargo Credit Corp. v. Ziegler, 780 P.2d 703 (Okla. 1989)

Auditor did not need to look outside of its own records to find a missing taxpayer.

This case presents this Court with the opportunity to resolve the conflict among the states and to clarify the minimum requirements necessary to satisfy due process in a tax sale. Before the Indiana Court of Appeals and the Indiana Supreme Court, the homeowners urged the Indiana Courts to follow the decisions from the other jurisdictions cited herein, but the Indiana Courts refused to consider those decisions. Indiana's decision contravenes ruling precedent by this Court in Mennonite. If the homeowners lived in any of the states whose decisions are cited herein, other than Indiana, the decision would have been in favor of the homeowners. For these reasons, this court should grant a writ of certiorari to the Indiana Court of Appeals and reverse its decision.

Respectfully submitted,



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APPENDIX

IN THE ELKHART SUPERIOR COURT #2

CLARENCE YODER and LEONA YODER vs. ELKHART COUNTY AUDITOR and ELKHART COUNTY TREASURER

CAUSE NO. 20D02-8711-CP-00803

BE IT FURTHER REMEMBERED, that afterward, to-wit: on the 21st day of January, 1991, at the Court Room in the City of Elkhart, before the Honorable Stephen E. Platt, regular Judge of said Court, the following proceedings were had in the above-entitled cause, to-wit:

Defendants Elkhart County Auditor and Treasurer Motion For Summary Judgment now granted. Defendant's Motion For Fees and Expenses now denied. Notice ordered.

Clarence YODER and Leona Yoder,
Appellants-Plaintiffs,

v.

ELKHART COUNTY AUDITOR and
Elkhart County Treasurer,
Appellees-Defendants.

No. 20A05-9105-CV-00150.

Court of Appeals of Indiana,
Fifth District.

April 7, 1994.

William J. Cohen, Elkhart, for appellants.

R. Gordon Lord, Craig M. Buche, Goshen, for appellees.

SHARPNACK, Chief Justice.

Clarence and Leona Yoder appeal a summary judgment entered for the Elkhart County Auditor (Auditor) and Elkhart County Treasurer (Treasurer). The Yoders present two issues for appeal, which we restate as one: whether the trial court erred in entering summary judgment. We affirm.

The Yoders owned a certain tract of real estate in Elkhart County, Indiana. As a result of tax delinquencies spanning more than two years, this real estate was scheduled to be sold at a tax sale on August 12, 1985. On or about June 28, 1985, notice of the tax sale was sent by certified mail to the Yoders at 524 E. Lincoln Avenue, Goshen, Indiana, the last known address of the Yoders associated with the subject real estate according to the records in the Auditor's office. This notice was returned to the Auditor as unclaimed. Barbara Wray, an employee in the Auditor's Office, searched for another address in the R.K. Polk Goshen City Directory and found a listing for the Yoder Feed Company at the 524 E. Lincoln Avenue address. Wray sent the notice of tax sale a second time on or about July 16, 1985, to the Yoders in care of the Yoder Feed Service at 524 E. Lincoln

Avenue, Goshen, Indiana, but the notice again came back unclaimed. The records reveals that the Yoders had owned and operated the Yoder Feed Service at the 524 E. Lincoln Avenue address until October, 1985, when Mr. Yoder closed the business and stopped receiving mail at that location. The Yoders did not update their mailing address with the Auditor or the post office. On August 12, 1985, the Yoders' real estate was sold to Richard Adams at a tax sale.

Approximately two years later, on or about July 14, 1987, the Auditor sent a "notice of tax sale redemption or issuance of tax deed" to the Yoders at the 524 E. Lincoln Avenue address, which also was returned unclaimed and marked with the notation "Moved Left No Address." The real estate was not redeemed during the statutory redemption period and as a result, on august 13, 1987, a tax deed was issued to Adams.

The Yoders provided the Auditor with a new address once they became aware that the tax deed was issued to Adams.

The Yoders filed a three count action to quiet title to the real estate on November 19, 1987. The Yoders sought to have the tax sale and deed set aside, arguing that the sale was invalid because they did not receive proper notice of the tax sale from the Auditor and Treasurer. Count I of their complaint was a claim seeking to quiet title, Count II was a claim for adverse possession, and Count III was a claim for damages directed at the Auditor and the Treasurer.

On July 22, 1988, the Yoders moved for summary judgment on Count I of their complaint, asking the trial court to declare the tax sale invalid. Adams also moved for summary judgment arguing that the tax sale was valid. On October 31, 1988, the court

issued its decision finding that the tax sale was valid and entered summary judgment in favor of Adams. The Yoders initiated an appeal, but then settled their differences with Adams by entering into a contract to purchase real estate and a covenant not to pursue litigation. The Yoders filed a motion to dismiss the pending appeal, which this court granted on October 2, 1989. The Yoders then sought to proceed with their claim for damages under Count III against the Auditor and Treasurer.

On September 24, 1990, the Yoders filed a motion for summary judgment on the issue of liability against the Auditor and Treasurer for failing to provide adequate notice of the tax sale. The Auditor and Treasurer filed legal memoranda in opposition to the Yoders' motion for summary judgment asserting that the issue of notice adequacy had already been concluded and that

the Yoders could not relitigate it. The Auditor and Treasurer in turn sought summary judgment against the Yoders based on res judicata and collateral estoppel.

On January 21, 1991, the trial court denied the Yoders' motion for summary judgment against the Auditor and Treasurer and granted the Auditor and Treasurer's motion for summary judgment against the Yoders.[1] The Yoders initiated this appeal and thereafter sought transfer of their appeal to the Indiana Supreme Court so that their case could be decided together with other pending cases involving similar due process issues. On December 30, 1991, the

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[1] We do not determine the issue of whether res judicata and collateral estoppel prevented the Yoders from appealing the trial court's entry of summary judgment, or whether the Auditor and Treasurer are amenable to a suit for damages. Instead, our finding that the notice given to the Yoders of the tax sale and tax redemption met constitutional standards is dispositive of the present appeal.

Indiana Supreme Court denied the Yoders' petition to transfer and this court granted a stay pending the supreme court's decision in *Elizondo.* Following the supreme court's decision, on August 3, 1993, this court resumed consideration of the Yoders' appeal after allowing amendments of briefs.

When we review the trial court's entry of summary judgment, we are bound by the same standard as the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ayres v. Indian Heights Volunteer Fire Dept., Inc.* (1986), Ind., 493 N.E.2d 1229, 1234. The appellant has the burden of proving that the trial court erred in determining that there are no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Rosi v. Business Furniture Corp.*

(1993), Ind., 615 N.E.2d 431, 434. We do not weigh the evidence, but we will consider the facts in the light most favorable to the nonmoving party. *Collins v. Covenant Mutual Insurance Co.* (1992), Ind. App., 604 N.E.2d 1190, 1194. This court may affirm the trial court's ruling on a motion for summary judgment even if such affirmation is on grounds different than those reflected in the trial court's order. *Douglass v. Irvine* (1990), Ind. 549 N.E.2d 368, 371; *City of Tipton v. Baxter* (1992), Ind. App., 593 N.E.2d 1280, 1282.[2]

Indiana Code §6-1.1-24-4 prescribes how notice is to be provided to the owners of property subject to a tax sale. It provides:

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This case was decided prior to the amendment of T.R. 56, effective January 1, 1991, which requires the parties to designate to the court all evidentiary matter on which the parties rely in either promoting or opposing the motion.

(a) Not less than twenty-one (21) days before the date of application for judgment and order for sale of real property eligible for sale, *the county auditor shall send a notice of the sale by certified mail to the owner or owners of the real property at their last known address.* . . . Failure by an owner to receive or accept the notice required by this section does not affect the validity of the judgment and order.

I.C. § 6-1.1-24-4 (emphasis added.)

It is well settled that before an action affecting a party's interest in life liberty, or property protected by the Due Process Clause of the Fourteenth Amendment proceeds, the State, at a minimum, must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the

action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865. Such notice must reasonably convey the required information to the affected party, must afford a reasonable time for that party to respond, and is constitutionally adequate when the practicalities and peculiarities of the case are reasonably met. 339 U.S. at 314-15, 70 S.Ct. at 657. The reasonableness of the notice given depends on the means chosen by the State to provide notice. *Id.* Whether notice is reasonable depends on the balance struck between the State interest involved and the constitutionally protected individual interest involved. *Id.* It is the State's responsibility to strike the proper balance between these conflicting interests. *Id.*

In their original brief, the Yoders

argued that the trial court's granting of the Auditor and Treasurer's motion for summary judgment was incorrect based on *Elizondo v. Read* (1990), Ind. App., 553 N.E.2d 849, in which this court held that "*Mennonite Board of Missions v. Adams* [(1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180] places an affirmative obligation upon the State to --minimally-- check the public records to ascertain the correct address of any party whose property interests are to be adversely affected by tax sale proceeds." *Elizondo*, 553 N.E.2d at 851.

In their amended brief, the Yoders argue that the Indiana Supreme Court's holding in *Elizondo v. Read* (1992), Ind., 588 N.E.2d 501, which vacated this court's decision, noted *supra*, misapplies the United States Supreme Court's holding in *Mennonite* and therefore, we should follow the

Mennonite decision. We disagree with the Yoders' contention that these two cases are in conflict.

To better understand our decision, it is necessary to review the Indiana Supreme Court's *Elizondo* decision. The Elizondos purchased a recreational lot in Plymouth, Indiana, in 1979. *Elizondo*, 588 N.E.2d at 502. From 1981 to 1984, the real estate tax statements for the property were addressed to the Elizondos' residence at 213 North Second Street, Plymouth, Indiana. *Id.* During this period, the Elizondos moved twice. *Id.* From 1983 to 1984, they resided at 310 South Plum Street, Plymouth, Indiana. *Id.* In 1984, they purchased a new residence and relocated again, moving to 1631 West Harrison, Plymouth, Indiana. *Id.*

The Elizondos fell into arrears on property taxes on the recreational lot. *Id.* All notices sent to the Elizondos by the

Marshall County Auditor were sent to the 213 North Second Street address. *Id.* Tax statements sent to this address were returned unclaimed. *Id.* The auditor sent a courtesy letter to the Elizondos, followed by a certified mailing of the formal notice of tax sale, dated July 23, 1984. *Id.* This notice was returned unclaimed. *Id.* Notice of the tax sale was placed in several newspapers and the Reads purchased the property at the tax sale. *Id.*

Two years later, the auditor sent the Elizondos a "notice of tax sale redemption or issuance of tax deed" by certified mail to the 213 North Second Street address. *Id.* The notice was returned unclaimed because the post office had no forwarding address and the Elizondos failed to provide any change of address notice to the auditor. *Id.* A tax deed was issued to the Reads. *Id.* In 1984, when the tax sale notices were

ailed, the auditor had available personal property records indicating that the Elizondos resided at 310 South Plum Street. *Id.* In 1986, at the time of the forwarding of the notice of redemption, the auditor maintained a real estate tax file and an alphabetized real estate card file containing listings for the Elizondos former and current addresses. *Id.* Also, the Elizondos were listed in the phone directory at the proper address during the time period in question. *Id.*

Our supreme court held that notice to the Elizondos at their 213 North Second Street address was sufficient, writing

> "[a]ll [that] is required is that the auditor send notice to the owner's last known address, that is, the last address of the owner of the specific property in question of which the auditor has knowledge from records

maintained in its office."

Id. at 504-05.

The supreme court further stated:

> "It is reasonable to require the auditor to search the records of his own office for other possible addresses upon the receipt of an undelivered notice. It is not, however, reasonable to require the auditor to speculate as to whether these possible alternatives are addressed for the property owner who owes taxes on the property in question or another taxpayer with the same name."

Id. at 505.

The United States Supreme Court in *Mennonite, supra,* held that when a "mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice

mailed to the mortgagee's last known available address, or by personal service" to satisfy the mandate of *Mullane*. 462 U.S. at 798, 103 S.Ct. at 2711. The Supreme Court further stated:

> "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."

Id. at 800, 103 S.Ct. at 2712.

Contrary to the Yoders' argument, we do not find a conflict existing between the holdings in *Elizondo* and *Mennonite*. Both decisions seek to and do satisfy the mandate of *Mullane*. *Mennonite* provides that notice by mail or other means

as certain to ensure actual notice is required where the name and address of any party with a liberty or property interest are reasonably ascertainable. 462 U.S.at 798, 103 S.Ct. at 2711. Notice sent "to the owner's last known address. . .of which the auditor has knowledge from its records maintained in its office" satisfied the *Mennonite* notice requirement. 588 N.E.2d at 504-05. Because the Indiana Supreme Court in *Elizondo* addressed similar issues regarding the property owner that are involved in the instant case, we rely on our supreme court's *Elizondo* decision.

The Yoders argue that if *Elizondo* is controlling, then reversal is warranted because the Auditor should have personally served them with notice since the Yoders' current residential address and the address for the tax sale property were one and the same. Whether the property and address were

one and the same, however, is of no consequence. *Elizondo* states that notice is sufficient when the auditor sends "notice to the owner's last known address, that is, the address of the owner of the specific property in question of which the auditor has knowledge from records maintained in its office." 588 N.E.2d at 504. In the instant case, the auditor had the Yoders' 524 E. Lincoln Avenue address on file in its office and it mailed notice to that address. The Yoders did not provide the Auditor with their new address and did not submit a change of address notice to the post office or otherwise arrange for the forwarding of their mail until after the tax deed was issued. The notice in this case met the *Elizondo* standard.

The Yoders further argue that reversal is warranted because a member of the Treasurer's staff helped the Auditor's

staff search for the Yoders' current address, which was on file in the Treasurer's office when notice of tax sale redemption was given to the Yoders. Therefore, the Yoders contend that the Treasurer's knowledge of their current address should be imputed to the Auditor. We disagree. An auditor is not "required to resort to the most recent telephone directories to ascertain a different address, nor should the auditor be required to search the records of other offices such as the recorder or the court clerk" to find the property owner's current address. *Id.* The fact that Barbara Wray chose to search for a more current address for the Yoders with the assistance of the Treasurer's staff is inconsequential.

We find that the notice given to the Yoders of all tax proceedings satisfied the notice requirements provided in *Elizondo*.

We therefore affirm the judgment of the trial court.

AFFIRMED.

RILEY, J., concurs.

RUCKER, J., concurs in result.

IN THE INDIANA SUPREME COURT

Clarence YODER and Leona Yoder,
Appellants-Plaintiffs,

v.

ELKHART COUNTY AUDITOR, and
Elkhart County Treasurer,
Appellees-Defendants.

No. 20A05-9105-CV-00150

Court of Appeals of Indiana,
Fifth District

You are hereby notified that on this day 7/19/94 APPELLANTS' PETITION TO TRANSFER TO THE INDIANA SUPREME COURT IS HEREBY DENIED.

ROGER O. DEBRULER, ACTING CHIEF JUSTICE

ALL JUSTICES CONCUR.

Supreme Court, U.S.
FILED
DEC 8 1994
OFFICE OF THE CLERK

No. 94-854

(2)

**IN THE SUPREME COURT
OF THE UNITED STATES
1994 TERM**

CLARENCE YODER AND LEONA YODER ..... PETITIONERS

v.

ELKHART COUNTY AUDITOR AND ELKHART
COUNTY TREASURER ..... RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI FROM THE
INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

ISSUE PRESENTED FOR REVIEW

Whether the due process clause of the Fourteenth Amendment is satisfied by mailed notice to the last known address of a property owner with respect to a property tax sale despite such notice being returned unclaimed?

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The opinion of the court below is cited as Yoder v. Elkhart County Auditor and Elkhart County Treasurer, 632 N.E.2d 369, (Ind. Ct. App. 5 Dist. 1994), tran. denied, (Ind. 1994).

JURISDICTION

An adequate statement of the jurisdictional grounds for this case is contained in the Petition for Writ of Certiorari.

UNITED STATES CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The provision of the Constitution and state statutes upon which the Petitioner relies is contained in the Petition for Writ of Certiorari. Respondents, however, would point out an apparent failure of the Petitioners to comply with Rule 29.4(c) of the Supreme Court Rules. Petitioners are necessarily challenging the constitutionality of the Indiana State statutes governing property tax sales with respect to notice requirements in relation to the standards of due process established under the Constitution. Respondents cannot locate any recitation in the Petitioners' initial filing that 28 U.S.C. § 2403(b) may be applicable nor that service has been made upon the attorney general of the State of Indiana.

STATEMENT OF THE CASE

The appeal below and this Petition for Writ of Certiorari involve the validity of and the procedures used in conducting a tax sale in Elkhart County, Indiana for delinquent real estate taxes. Because the real estate taxes had been unpaid for more than two (2) years, certain real estate owned by the Petitioners, Clarence and Leona Yoder ("Yoders"), was placed in the 1985 property tax sale in Elkhart County. (Exhibits 1 and 2 attached to Deposition of Wray, p. 151). Richard C. Adams ("Adams") purchased this real estate at the tax sale on or about August 12, 1985. Since the property was not redeemed within the statutory redemption period, Adams was issued a tax deed to the property on or about August 12, 1987. (Affidavit of Adams, pp. 36-37).

Once it was determined the property would be entered in the tax sale, the Elkhart County Auditor ("Auditor") sent notice of the tax sale by certified mail to the Yoders at 524 E. Lincoln Ave., Goshen, Indiana on or about June 27, 1985. This notice was returned unclaimed. (Deposition of Wray, p. 124). The 524 E. Lincoln Ave. address was the last known address of the Yoders according to the records in the office of the Auditor. (Deposition of Wray, p. 124). Upon receipt of the unclaimed notice, the Auditor's office took affirmative action to find another address for the Yoders by looking in the R.K. Polk City Directory. The Auditor's office found an address for Yoder Feed Company at 524 E. Lincoln Ave. (Deposition of Wray, pp. 125-127). The Auditor's office sent the Notice of Tax Sale a second time on or about July 16, 1985 to the Yoders in care of Yoder Feed Service; however, it still came back unclaimed. (Deposition of Wray, pp. 125-126). Contrary to the Petition for Writ of Certiorari (p. 6), Yoder, according to his own affidavit, owned and operated Yoder Feed Service at 524 E. Lincoln Ave., Goshen, Indiana until October, 1985 when he closed the business and no longer received mail at that location. (Affidavit of Yoder, p. 40).

After unsuccessfully attempting to notify the Yoders, Elkhart County sold the real estate to Adams on or about August 12, 1985.

Approximately two (2) years later, the Auditor's office sent the Notice of Tax Sale Redemption or Issuance of Deed to the Yoders on or about July 14, 1987 to 524 E. Lincoln Ave. (Deposition of Pinkerman, p. 102). This notice was also returned unclaimed. The 524 E. Lincoln address was the last known address maintained in the records of the Auditor's office and the only address that the Auditor's office could find for the Yoders. Again, the Auditor's office took further action by checking the R.K. Polk City Directory and by asking various individuals about Clarence Yoder's whereabouts. However, no one knew where he could be located. (Deposition of Pinkerman, pp. 104-105). Therefore, a tax title deed was issued to Adams as the successful tax sale purchaser on or about August 12, 1987.

After Adams was issued the deed to the property, the Yoders filed an "Action to Quiet Title to Real Estate" on or about November 19, 1987 which included Adams, the Elkhart County Auditor, and the Elkhart County Treasurer as Defendants. On October 31, 1988, the trial court granted Adams' motion for summary judgment against the Yoders holding that the tax sale was valid. The Yoders commenced an appeal in the Indiana Court of Appeals, but before filing their appellate brief, the Yoders settled their dispute with Adams and dismissed their appeal.

The Yoders attempted to renew the litigation at the trial court level by filing a motion for summary judgment on September 24, 1990 against the Elkhart County Auditor and the Elkhart County Treasurer. The Yoders alleged that the Elkhart County Auditor and the Elkhart County Treasurer failed to provide adequate notice of the tax sale. On January 21, 1991 the trial court upheld the validity of the tax sale and granted summary judgment in favor of the Elkhart County Auditor and the Elkhart County Treasurer.

The Yoders appealed and on April 7, 1994, the court of appeals upheld the notice procedures used by the Elkhart County Auditor and affirmed the trial court's decision granting the motion for summary judgment in favor of the Elkhart County Auditor and Elkhart County Treasurer. The Indiana Supreme Court, on July 19, 1994, denied transfer without an opinion.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for three significant reasons. First, mailed notice by certified mail with return receipt requested to a property owner at his or her last known available address for purposes of a tax sale satisfies due process even when such notices are returned unclaimed. Due process merely requires that notice be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection. This Court has repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. The fact that an article of mail is returned unclaimed does not render the notice deficient from a due process standpoint. Second, though not required by due process standards, the office of the Elkhart County Auditor went still further and exercised reasonable efforts to locate an alternative address for the Yoders when the notices were returned unclaimed. The fact that those efforts were unsuccessful does not alter the outcome of this case. Finally, the procedural posture of this case renders it particularly inappropriate to render a decision of constitutional dimension. An issue of state law, being res judicata, remains unresolved and undecided. Thus, a reversal at this stage of the proceedings would require a remand for consideration of the state law issue which might then render the determination of this Court inconsequential. For all of these reasons, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE ELKHART COUNTY AUDITOR USED TAX SALE NOTICE PROCEDURES WHICH SATISFY THE DUE PROCESS REQUIREMENTS ESTABLISHED BY THE CONSTITUTION.

The Petition for Writ of Certiorari should be denied because this Court has already addressed the applicable due process standard in Mennonite Board of Missions v. Adams, (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.E.2d 180. In that case, this Court established the requirements for tax sale notice. Since the Auditor followed those requirements by mailing notice to the Yoders at their last known address, the notice sent to the Yoders was sufficient and the tax sale was valid. Due process does not require nor guarantee actual notice. The Yoders argue that the Auditor should have further utilized "reasonable business practices" to find an accurate mailing address for them when the mailed notices were returned unclaimed. The Yoders' contention means that the Auditor's office should have done more than what is constitutionally required due process in its attempt to notify the Yoders. The Auditor, however, complied with the due process requirements by sending notice to the Yoders at the last known address of the Yoders that was maintained in the office of the Auditor. Thus, no substantial question has been presented to this Court for review.

The constitutional due process standard of notice for an action which will affect property interests requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." Mullane v. Central Hanover Bank and Trust Company, (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. This Court discussed the requisite notice for a tax sale in Mennonite Board of Missions. This Court stated the constitutional due process standard as to notice of a tax sale in the following way:

> When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by

> publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. Mennonite Board of Missions, 462 U.S. at 798.

Thus, pursuant to the standard established in Mennonite Board of Missions, in order to satisfy the due process requirement for tax sale notice, the notice must be sent to the last known available address of the owner of the affected property interest. The Auditor satisfied that standard. The last known address the Yoders maintained in the Auditor's office was 524 E. Lincoln Ave. When the first notice of Tax Sale came back unclaimed, the Auditor sent a second notice which also came back unclaimed. The 524 E. Lincoln address was the only address for the Yoders in the Auditor's records.

Near the end of the statutory redemption period, the Elkhart County Auditor sent a final notice to the Yoders. Again, the Auditor sent the notice to the last known address of the Yoders. Upon searching the records, the last known available address was still 524 E. Lincoln Ave. There was no other address for the Yoders in the Auditor's records. The Notice of Tax Sale Redemption or Issuance of Deed sent to the Yoders came back unclaimed. Further efforts were made to locate another address for the Yoders without success. After the redemption period ended and the Yoders had not responded, the Auditor proceeded to issue the tax deed to Adams and conclude the tax sale. Throughout this entire process, the Auditor's office satisfied the due process requirements for notifying an owner or former owner of the tax sale by using mailed notice to the last known address for the Yoders; consequently, the Elkhart County Auditor provided adequate notice to the Yoders.

II. ALTHOUGH NOT REQUIRED TO SATISFY DUE PROCESS STANDARDS, WHEN THE NOTICES SENT TO THE YODERS CAME BACK UNCLAIMED THE ELKHART COUNTY AUDITOR TOOK ADDITIONAL STEPS TO FIND ANOTHER ADDRESS FOR THE YODERS.

In the present case, the Elkhart County Auditor sent notice to 524 E. Lincoln Ave. This was the last known address the Yoders maintained in the records of the Auditor's office. The Auditor did not look for another address in the local telephone book, but did consult the City Directory. Although it was unnecessary, the Auditor's office did make an effort to look for another address of the Yoders. The procedure used by the Auditor satisfied and even went beyond due process requirements.

Even if this Court held that the Elkhart County Auditor had an affirmative duty to inquire about the Yoder's address after notices were returned unclaimed, the Auditor's actions would satisfy such a requirement. The Elkhart County Auditor did not have a legal duty to search for another address, but a reasonable attempt was made to find another address for the Yoders by using the City Directory and by requesting information from other employees in the Auditor's office. The fact that the employees in the office of the Elkhart County Auditor were unsuccessful in locating an accurate address for the Yoders does not invalidate the notice given and the tax sale conducted. Thus, the Elkhart County Auditor complied with the due process requirements concerning notice of the tax sale and notice of the redemption rights by sending the notices by certified mail to the last known address for the Yoders.

The Elkhart County Auditor's office went beyond its constitutionally required duty to provide notice to the owner of the impending tax sale. The Elkhart County Auditor took affirmative steps in attempting to locate another address for the Yoders. Although the attempt was unsuccessful, it does not follow that the notice was insufficient. The fact that an employee in the office of the Elkhart County Treasurer had an address for a Clarence Yoder in 1987 near the expiration of the redemption period does not change the result. First, the Elkhart County Treasurer and the Elkhart County Auditor are separate constitutional offices in the State of Indiana with independent obligations and responsibilities. The Elkhart County Treasurer does not have any part in the mailing of tax sale or redemption right notices; the responsibilities for those actions are vested in the office of the Elkhart County Auditor by statute in Indiana. Second, there was no knowledge at the time in 1987 that this other address was the correct and known address for

the same Clarence Yoder involved in this case. It was merely an address for a Clarence Yoder. The address was not available in the Auditor's office and cannot even be considered as a "known" address for the Yoders in 1987. The Auditor therefore afforded proper legal notice to the Yoders by mail at their last known address. Consequently, adequate legal notice was given to the Yoders in accordance with statutory and constitutional standards. Since notices were properly given, the tax sale was validly held.

III. EVEN IF THIS COURT WERE TO CONSIDER AN EXPANSION OF THE HOLDING FROM MENNONITE BOARD OF MISSIONS, THIS CASE WOULD NOT PROVIDE THE COURT WITH AN APPROPRIATE PLATFORM TO DO SO BECAUSE OF ITS PROCEDURAL POSTURE.

At an earlier stage of these proceedings in 1988, the Yoders moved for summary judgment against Richard Adams, the tax sale purchaser, and all others quieting title to the real estate and finding the tax sale void. (Plaintiff's Motion for Summary Judgment, p. 69). At that time, the Yoders claimed that the Elkhart County Auditor and Elkhart County Treasurer did not give them adequate notice of the tax sale and of their redemption rights. Richard Adams similarly filed a motion for summary judgment claiming ownership to the subject real estate based upon his purchase at the tax sale and the issuance of a tax title deed in his favor. The trial court entered an Order on October 31, 1988 upon which Judgment was entered against the Yoders upholding the sale of the subject real estate and determining that the Elkhart County Auditor did all that was legally required in order to conduct a valid property tax sale. The Yoders then commenced an appeal in the Indiana Court of Appeals. Before filing their appellate brief, the Yoders settled their dispute with Adams and dismissed the appeal. Because of this adverse judgment and the subsequent dismissal of the appeal, the Yoders should be barred from proceeding on a claim for damages with respect to the tax sale against the Elkhart County Auditor and the Elkhart County Treasurer on the grounds of res judicata.

The Yoders attempted to renew the litigation at the trial court

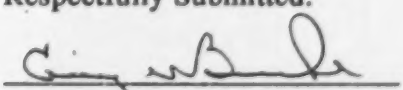
level by filing a motion for summary judgment on September 24, 1990 against the Elkhart County Auditor and the Elkhart County Treasurer again alleging a failure to provide adequate notice of the tax sale. The validity of the tax sale was upheld which led to the appeal and this Petition for Writ of Certiorari.

Because of the first judgment in this case in 1988 upholding the validity of the tax sale and the subsequent dismissal of the first appeal, the Elkhart County Auditor and the Elkhart County Treasurer contended that further proceedings are barred on the grounds of res judicata. The issue of res judicata was briefed at the trial level and on appeal although the Indiana Court of Appeals elected not to decide the issue. Yoder v. Elkhart County Auditor and Elkhart County Treasurer, 632 N.E.2d 369, n.1 (Ind. Ct. App. 5 Dist. 1994), tran. denied, (Ind. 1994). If this Court were to grant the Petition and hear the due process issue, all of the Court's work may go for naught because a reversal would necessitate a remand for purposes of deciding the state law issue of res judicata. Thus, the procedural posture of this case makes it particularly inappropriate for a decision of constitutional import.

CONCLUSION

For all the foregoing reasons, the Respondents, Elkhart County Auditor and Elkhart County Treasurer, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted:



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